NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

vs.

JAMES G. SMYTH, Collector of Internal Revenue for the First District of California,

Appellee.

Reply Brief for Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division.

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PRELIMINARY STATEMENT

Appellant filed his brief in this Petition for Review on the 24th day of February, 1955, and the brief for respondent-defendant was received by appellant's attorney on April 5th, 1955. This Reply Brief is therefore due to be filed on or before April 15th, 1955.

ARGUMENT

Appellant, before stating his reply to defendant's "Arguments", would like to invite the Court's attention to several statements by defendant preceding his "Argument".

In the "Opinion Below", it is suggested by defendant that the District Court's final order resulted from a remand from this Court. There was no remand—to the contrary, the appeal was dismissed without prejudice, the language directed more to the appellant than to the Court below.

Under "Jurisdiction", defendant again suggests a remand from this Court, but fails to note the action on the first amended complaint where defendant's motion for summary judgment was summarily denied (Tr-52), indicating a triable issue.

The "Question Presented" by the defendant is in fact only one of several, although in his "Argument", he does recognize that other grounds and issues exist.

In the "Statement" defendant suggests (Br-9, last par.) that this Court's dismissal of appellant's appeal was based upon its review of all the pleadings

prior to the lower court's dismissal of the action, thereby implying acquiescence of this Court in the dismissal of the original and first amended complaint (re: jeopardy assessment), which actually had not yet been dismissed (Tr-34). So far as appellant knows, this Court's review was only of the denial of the motion for rehearing.

Defendant's lengthy "Statement" clouds the fact that at one stage one of the lower courts recognized a cause of action (re: jeopardy assessment) and also recognized that appellant *might* have a further cause of action (re: validity of waiver) (Tr-top page 35). *This latter, and new ground, is contained in the last paragraph of Paragraph II of the second amended complaint* (Tr-37), and was not part of the original or first amended complaints.

Appellant respectfully submits that the lower courts and defendant were fully apprised of the three (3) issues before this Court: first, are the facts alleged sufficient to support "extraordinary circumstances" (not narrowed to overt acts by the defendant) justifying injunction; second, was there a jeopardy assessment, and, if so, is the defendant bound by the statute to issue a notice; third, is appellant entitled to be heard on the validity of the waiver, and, if so, is the waiver valid under the rule of this Court. The essence of our rules of Federal Procedure is simplification and abolition of pleading technicalities. There is no "surprise" about these issues, defendant acknowledges the issues in his argument, they were amply briefed in the lower courts,

and appellant respectfully submits that this Court is entitled to review the whole case de novo and determine the correctness of the lower courts' actions on all the errors cited for appeal without searching for technical flaws to bypass equity.

IN RE: INJUNCTION

Has "extraordinary circumstances" for equity to intercede been narrowed to overt acts of the government agents? Can anyone, let alone a public official, close his eyes to an injury to another, reap the benefits, and claim immunity under the very document under which a fraud was perpetrated and whose own validity is questionable, steadfastly refusing reconsideration where there would be no detriment to defendant to do so *unless defendant's position was untenable legally and equitably.* Is it necessary that the defendant be "arbitrary and oppressive" *before* the determination, excusing such acts *after* the determination in the light of the circumstances here alleged, where the defendant's sole duty is to collect the taxes legally due?

Defendant (Br-32) denies that appellant has no adequate remedy at law, suggesting a refund suit. The document he insists is valid binds plaintiff to file no such claim (Appendix B, page VI), and is final according to defendants brief, page 31. The irreparable damage to appellant arises from defendant's seizure, of which the inability to sue for a refund is only a facet. In one of the earlier hearings,

on the argument on order to show cause, October 29, 1953, defendant repeatedly refused to answer the Court's inquiry of whether the defendant would withhold further seizure and sale pending judicial determination of appellant's case (Reporter's Transcript, page 65, 66, 70, 71). This was not in the transcript of record because defendant has not heretofore raised the question in any brief, and plaintiff necessarily kept the costs of printing at a minimum so as to avoid filing in forma pauperis.

It is noted that defendant argues strongly for the exclusion from consideration by this Court of the facts alleged by appellant's affidavits, at the same time arguing the forcefulness of his Exhibits and pleading willingness to meet any "meritorious claim" (Br-32). By refusal to look at the facts?

Appellant respectfully submits that *evidence* of defendant's knowledge of injury to the appellant is appropriate to the hearing on the merits, and not to be pleaded after allegation. Obviously, as one of the Points on Appeal, appellant has not abandoned his plea for injunction as suggested by defendant (Br-25). Since there was no trial in the lower courts, this Court is free to draw its own inferences from the allegations and affidavits which stand uncontroverted on the pleadings in reference to the injunction.

In re: JEOPARDY ASSESSMENT

Defendant, in his brief, page 29, does not controvert the fact of a jeopardy assessment, but does

dismiss the legal issue by a truly "short and complete answer" that the waiver eliminates the necessity for a determination under Sec. 272(a) or for a jeopardy assessment under Sec. 273(a). Section 273(b) says, *"If the jeopardy assessment is made* (a fact not denied by defendant in his brief, and at least at issue) *before any notice* in respect of the tax to which the jeopardy assessment relates *has been mailed* under Section 272(a) (defendant has stipulated that the notice was not sent) *then the Commissioner shall mail such notice* under such subsection within sixty (60) days after making the assessment.", (emphasis supplied).

In his footnote 14, page 29, so placed to indicate a further expression of the case quoted, defendant assumes the interdependence of Section 272 and 273, whereas the only connection is the requirement in Sec. 273(b) that the letter be sent. The subsection doesn't even contain the word "determination".

Whether there would be the "need" (Br-footnote 14) for the jeopardy assessment after a waiver (assumed valid) might make a nice legal question, but here we are faced with an alleged *fait accompli,* and are not concerned with the necessity. Is the defendant more excusable from acts than is the plaintiff?

In re: VALIDITY OF WAIVER

Can a statute (Sec. 272(d) providing for waivers) granting a unilateral "right" (admitted by defendant, Br-31, line 10) be enlarged by administrative fiat into a bilateral agreement, denying the taxpayer

the very privilege (of going to Tax Court) that Congress intended to preserve unto him? This Court has answered in the negative, but defendant still insists on the correctness of the First Circuit (Br-21, 27, 29). He further distinguishes by claiming that the instant case involves waivers 870 TS, whereas this Court considered mere waivers 870, although the statutory basis of both is the same. If the waiver 870 TS is to "form the basis for a final closing agreement" (Br-31) why not use the final closing agreement provided in Sec. 3760, IRC. He further distinguishes the cases in this Circuit on the facts. Does that alter the rule? Or, does the rule depend upon who seeks to invoke it, as did the defendant in one of the cases?

Defendant excepts to appellant's pointing to the acceptance in the 1954 Internal Revenue Code of this Court's rule (Br-31, last sentence). His italicized quote means the taxpayer can waive before or after notice the restrictions of subsection (a) *on assessment and collection,* but it does not waive the *notice required in another independent section,* Sec. 6212(a), 1954 IRC.

The First Circuit cases cited by defendant, however, support appellant's contention that the issue of validity of the waiver should be resolved before determining jurisdiction. Appellant submits that the validity was and is at issue, but has not been considered, or if considered, then the lower court's order was in error in dismissing the action.

CONCLUSION

Appellant resists narrowing this appeal to a question of injunction. He seeks an injunction on the allegations of arbitrary and oppressive conduct of defendant under the circumstances, after as well as before the waivers; further, on the ground that the defendant failed to comply with the statutory requirements in his act of making a jeopardy assessment; and finally on the ground that the waiver was invalid, bringing the defendant within violation of the statutory requirements of Sec. 272(a) that a notice be issued, otherwise injunction can lie.

(1) Appellant also contends that rescission on equity grounds is as an appropriate a remedy in this instance as is injunction and points out that there is no statutory bar to rescission of the disputed waiver.

Appellant respectfully submits that he is entitled to his day in Court on the facts, and that the legal issues should be resolved before he suffers irreparable loss without an adequate remedy at law.

Dated at Stockton this 14th day of April, 1955.

Respectfully submitted,

SEAMAN & DICK,
By Wareham Seaman
(Attorneys for Appellant.)